

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

8 U.S.C. §1324a
PROCEEDING

v.

APPLIED COMPUTER TECHNOLOGY,
Respondent.

OCAHO Case
No. 90100316

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE
AND GRANTING RESPONDENT'S MOTION TO AMEND ANSWER

On October 22, 1990, Complainant United States of America, through the Immigration and Naturalization Service ("INS"), filed a Complaint Regarding Unlawful Employment against Respondent Applied Computer Technology.

The Complaint alleges that Respondent has violated §274A(a)(1)(B) of the Immigration and Nationality Act of 1952 [8 U.S.C. §1324a(a)(1)(B)]. Specifically, the Complaint alleges Respondent's failure to provide five (5) Employment Eligibility Verification Forms ("I-9" Forms) to the INS for inspection purposes.

On November 19, 1990, Respondent filed an Answer to the aforementioned Complaint.

By a Motion filed with this office on March 11, 1991, the Complainant now moves to strike all affirmative defenses contained in the Respondent's Answer.

On March 13, 1991, Respondent filed a Response to the Complainant's Motion to Strike Affirmative Defenses. At the same time, Respondent also filed a Motion to Amend Answer; in this latter Motion, Respondent seeks to add an additional affirmative defense to its Answer.

Complainant's Motion to Strike

Complainant seeks to strike the Respondent's affirmative defenses pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. F.R.C.P. Rule 12(f) states:

"Upon Motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Here, it appears that Respondent has served its Answer upon the Complainant on or about November 19, 1990. Complainant, however, did not file its instant Motion to Strike Affirmative Defenses until March 11, 1991. This is more than 100 days since Complainant was first served with the Answer. Therefore, in accordance with Rule 12(f) of the Federal Rules of Civil Procedure, Complainant's Motion to Strike Affirmative Defenses is denied.

In its Response to the Motion to Strike, Respondent also requests this Court to award attorneys' fees against Complainant for the expenses incurred by Respondent in responding to the instant Motion to Strike Affirmative Defenses. Respondent bases this request upon Rule 11 of the Federal Rules of Civil Procedure.

Without inquiring into the merits of Respondent's request, it is clear that this Court does not possess the power to award attorneys' fees pursuant to F.R.C.P. Rule 11. The Rules of Practice and Procedure ("Rules") promulgated by the Attorney General for IRCA proceedings do not provide any sanctions against attorneys' potential misconduct. See 8 C.F.R. §68 et seq. It is true that 8 C.F.R. §68.1 of the Rules allows the Federal Rules of Civil Procedure to be employed as a "general guideline" for IRCA proceedings in cases where the Rules are otherwise silent. However, it has been established that this provision does not authorize Administrative Law Judges to award attorneys' fees in employer sanction cases under the aegis of F.R.C.P. Rule 11. See United States v. Nu Look Cleaners of Pembroke Pines, Inc., OCAHO Case No. 89100162, December 5, 1990 (Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order) at 11.

Accordingly, Respondent's request for attorneys' fees must be denied.

Respondent's Motion to Amend Answer

At this time, Respondent moves to amend its Answer in order to add a Sixth Affirmative Defense in this case. Respondent's Proposed Sixth Affirmative Defense alleges that Respondent has complied in good faith with IRCA's paperwork requirements.

Respondent's claim of good faith compliance is undoubtedly an important consideration for the determination of the appropriate

Civil monetary penalty amount in this case. However, there exists some questions as to whether "good faith compliance" can constitute an affirmative defense to the current allegations of IRCA paperwork violations.

Nevertheless, in view of the liberal amendment policies perpetuated by Rule 15(a) of the F.R.C.P., I will grant Respondent's instant Motion to Amend Answer.

SO ORDERED.



JAY R. POLLACK
Administrative Law Judge

San Francisco, California
Dated: March 22, 1991

Judge's Mailing Address: National Labor Relations Board
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